STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRYON PAUL BARRENGER,

Defendant-Appellant.

UNPUBLISHED
May 9, 1997

No. 191808
Kent Circuit Court
LC No. 93-063233-FC

Before: Markey, P.J., and Michael J. Kelly and M.J. Talbot,* JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of one count of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). As an habitual offender, second offense, MCL 769.10; MSA 28.1082, defendant was sentenced to ten to twenty-five years' imprisonment. We affirm.

Defendant was arrested and charged with two counts of first-degree CSC after the victim, a previous girlfriend, reported to hospital personnel that defendant had forced her to engage in nonconsensual sexual intercourse. At trial, defendant did not contest the fact that he and the victim had had intercourse, leaving consent as the essential issue for resolution.

I

Defendant first argues on appeal, despite his failure to raise an objection during trial, that he was denied a fair trial because highly prejudicial evidence pertaining to his past physical and verbal abuse of the victim was improperly admitted during trial. We disagree, and note that in the absence of an objection, our review is limited to a search for plain error or any resulting manifest injustice. MRE 103(d); *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992).

MRE 404(b) governs the admission of evidence of bad acts. It provides:

* Circuit judge, sitting on the Court of Appeals by assignment.

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The use of bad acts as evidence of character is excluded, except as allowed by MRE 404, and is improperly admitted where offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993). However, evidence is not necessarily subject to an MRE 404(b) analysis merely because it discloses a bad act; bad acts can be relevant as substantive evidence without regard to MRE 404. *Id* at 64. "[I]f the proffered other acts evidence is logically relevant, and does not involve the intermediate inference of character, Rule 404(b) is not implicated. . . . The question is not whether the evidence falls within an exception to a supposed rule of exclusion, but rather whether the 'evidence [is] in any way relevant to a fact in issue' other than by showing mere propensity. . . . 'Put simply, the rule is *inclusionary* rather than exclusionary.'" *Id*., citing *People v Engelman*, 434 Mich 204, 213, 216; 453 NW2d 656 (1990).

In the present case, although the evidence at issue admittedly creates a negative image of defendant, we find that it is extremely probative of whether McKay had in fact consented to sexual intercourse with defendant, and it also explains why McKay feared defendant and hesitated to report the incident. It was for these reasons that such evidence was elicited, rather than merely to make the "character to conduct" inference forbidden under MRE 404 and *VanderVliet*; for that reason, we conclude that the rule excluding the evidence is simply inapplicable. *VanderVliet, supra*, at 64; *People v Flynn*, 93 Mich App 713, 718; 287 NW2d 329 (1979).

Furthermore, aside from the fact that the evidence was admitted for a proper purpose, we also note that defendant not only failed to object to the evidence, but actually elicited such testimony, and that both MRE 404 and MCL 750.520j(a); MSA 28.788(10)(a) provide for the admission of evidence concerning the victim's past sexual conduct with the defendant in a prosecution for CSC. Thus, we find no error or manifest injustice in allowing for its admission. *Yarger, supra*, at 539.

II

Next, defendant argues that he was denied effective assistance of counsel because his trial counsel failed to raise objections to the admission of the prior bad acts evidence, and to the hearsay testimony of the admitting nurse and the investigating officer concerning the victim's rape allegations. We disagree, and note that despite defendant's failure to properly preserve this issue, our review of the record reveals that in each instance, counsel's objections would have been futile.

Evidence of defendant's past abusive behavior was highly probative and properly admitted (as mentioned above), the nurse's testimony was properly admitted under MRE 803(4), which allows for

the admission of statements concerning the general character, cause, or source of present symptoms or pain for the purposes of obtaining medical treatment, and the officer's testimony (if at all incriminating) was in fact elicited by defendant, himself. Therefore, counsel

cannot be required to object to properly admitted evidence, *People v Tullie*, 141 Mich App 156, 158; 366 NW2d 224 (1985), and defendant cannot now find fault with the strategies counsel employed to support defendant's own defense theory, *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987), or with the admission of evidence he, himself, elicited.

III

Third, defendant contends that there was insufficient evidence to support his conviction, and/or that his conviction was against the great weight of the evidence presented at trial. We again disagree.

In reviewing a sufficiency of the evidence question, this Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the crime were proven beyond a reasonable doubt, and must refrain from interfering with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified 441 Mich 1201 (1992).

Defendant was convicted of one count of first-degree CSC, contrary to MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), which requires a showing that while engaging in sexual penetration with another person, "the actor causes personal injury to the victim and force or coercion is used." At trial, the victim testified that defendant penetrated her vagina with his penis, that he physically constrained her by squeezing tightly around her ribs and by holding her legs down, that she did not consent to the intercourse and suffered extreme pain and bruising of her ribs when she attempted to resist defendant, and that defendant threatened to kill her if she reported the incident. Qualifying as sufficient evidence alone [see MCL 750.520h; MSA 28.788(8)], we find that the victim's testimony, if believed by the jury, satisfied the elements required to convict defendant of the crime charged.

Next, determining whether a verdict is against the great weight of the evidence requires a review of the whole body of proofs, *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), with the test being whether the verdict is "against the overwhelming weight of the evidence", *Heshelman v Lombardi*, 183 Mich App 72, 76; 454 NW2d 603 (1990). Although it is in the trial court's discretion to grant or deny a new trial, *Herbert, supra*, at 477, the jury's verdict should not be set aside where there is competent evidence to support it; the trial court cannot substitute its judgment for that of the factfinder, *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 210; 457 NW2d 42 (1990).

Challenges to the great weight of the evidence generally involve matters of credibility or circumstantial evidence, *In re Robinson*, 180 Mich App 454, 463; 447 NW2d 765 (1989), but again, as with a sufficiency of the evidence claim, if there is conflicting evidence, the question of credibility must always be left for the factfinder, *Rossien v Berry*, 305 Mich 693, 701; 9 NW2d 895 (1943). In denying defendant's motion for a new trial, the lower court found that the victim was a credible witness and that her testimony satisfied the elements of the crime charged, and because the case was essentially a credibility contest between defendant and the victim, this Court has no basis upon which to dispute the lower court's assessment. We find that the record contains nothing to suggest that the court's decision to deny defendant's motion for a new trial was an abuse of discretion.

IV

Defendant next argues that he was denied a fair trial as a result of the prosecutor improperly urging the jury to "come through" for the victim, and because he improperly referred to defendant as a "bully" and a "rat." We disagree.

Appellate review of the allegedly improper prosecutorial remarks is precluded because defendant failed to timely and specifically object, unless, of course, this Court determines that an objection and cautionary instruction could not have cured the error, or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989).

Although it is not proper for the prosecutor to urge jurors to convict as a part of their civic duty, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), in the present case, we find that, when taken in context, the prosecutor did not appeal to the jurors' fears or prejudices, and in fact instructed them more than once to review the evidence and apply the law in reaching their conclusion. In addition, although the prosecutor's remarks characterizing defendant as a "bully" and a "rat" may have been somewhat distasteful, each was stated within a fair assessment of the facts presented during trial, and when taken in context, the prosecutor's conduct did not exceed that which would have been adequately addressed if defendant had raised a timely objection and requested a curative instruction. *Gonzalez, supra,* at 535.

V

Last, defendant argues that his conviction must be reversed because based on the court's instruction, it is unclear whether the jury's verdict was unanimous. We again disagree, and note that not only did defendant fail to object to the court's instruction concerning the verdict form, but also any error committed was not prejudicial.

Throughout the trial, evidence of two distinct acts of penile penetration was introduced, one having taken place on the bathroom vanity, and the other on the bathroom floor. Although defendant initially contended that both took place as one continuous act, he, too, later conceded that two penetrations occurred. Prior to deliberations, the jurors were specifically instructed that there were two counts charged, and were told of the necessity of returning a unanimous verdict.

While deliberating, the jurors returned to the courtroom expressing confusion as to how they should mark the verdict form if they were to decide that both counts of penetration constituted one continuous act, specifically asking, "If we decide that it was only one incident, do we have to answer the second charge?" In response to their inquiry, the court essentially instructed:

> You have to answer it, but I think you could respond to it as "not guilty" if that is your decision, it was just one incident and you decided on one count, what it was, and the second count, if you believe it was all one incident, you simply put 'not guilty' on that.

The jury then returned, finding defendant guilty on Count I, and not guilty as to Count II. Defendant was then sentenced in accordance with one count of first-degree CSC, rather then two (as initially charged and testified to). Defendant now claims that this Court must vacate his conviction because the jury's verdict violates the constitutional demand for unanimity, and cites *People v Yarger*, 193 Mich App 532; 485 NW2d 119 (1992), to support his contention. We conclude, however, that defendant's reliance on *Yarger* is misplaced, and the jury's verdict in the present case raises no question concerning unanimity.

In *Yarger*, the defendant was charged with a single count of CSC, whereas the testimony presented at trial supported two acts of sexual penetration, one involving fellatio, and the other, vaginal intercourse. *Yarger, supra*, at 534. The jury was then allowed to convict the defendant on the single sexual penetration charged if it believed that the evidence proved either penetration, or both, beyond a reasonable doubt. *Id*. at 536-537. Unable to discern for which act of penetration the defendant was found guilty, this Court reversed his conviction, holding:

> While we find nothing objectionable in the instruction itself, because only a single count of third-degree criminal sexual conduct was submitted to the jury, error occurred when the jury was not instructed that it must unanimously agree on *which* act(s) was proven beyond a reasonable doubt. In other words, a possibility exists that, for example, six jurors were convinced that fellatio had occurred, but not intercourse, while the other six jurors held the opposite view. [*Id*. at 537.]

As opposed to *Yarger*, the verdict form in the present case included two separate counts of CSC, as did the evidence presented at trial, and although the jury may have erroneously concluded that two separate acts of penetration could be considered under one count (as one continuous act), it is evident that the jurors at least were all in agreement that one act (if not two, as their earlier question posed to the court would suggest) occurred. In fact, the jury marked the verdict form just as the court had instructed, if the jurors should find that only one continuous act occurred. Nevertheless, even if the court was somewhat vague and/or misleading in instructing the jurors with respect to the verdict form, it was stressed that they must be unanimous in which ever count they did ultimately decide. Furthermore, defendant was in no way prejudiced by the court's instruction; instead, defendant was convicted of only one count of CSC, when the jury most likely agreed with the uncontested evidence presented during trial, but had erroneously characterized the two penetrations together as one act.

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ Michael J. Talbot